white person, where the aggrieved party does not disclose her race. It is not a legal injury for a white person to be taken for a negro under such circumstances. It is not contemplated by the statute of Virginia applicable to such cases that the carrier should be an insurer as to the race of its passengers. The court accordingly instructs the jury that, if they believe from the evidence that the conductor made in this case an honest mistake as to the race of the plaintiff, they must find for the defendant."

The amendment to each of these instructions reads: "Unless they further believe from the evidence the plaintiff then and there made known to the said conductor that she was a white woman."

Two theories of the case are submitted for consideration by the evidence, namely: On behalf of the plaintiff, that the conductor, although it was made known to him that the plaintiff was a white woman, required her to ride in the car set apart for colored persons; and, on behalf of the defendant, that the conductor acted in good faith under the honest belief that the plaintiff was a negro. The purpose of the defendant's instructions (which were practically rendered meaningless by the amendment) was to submit its theory of the case to the jury. In this, it was plainly within its rights, and the court should have given the instructions as prayed for without amendment. Jackson's Case, 96 Va. 107, 30 S. E. 452; Richmond Traction Co. *v.* Martin's Adm'r, 102 Va. 209, 45 S. E. 886.

As the judgment must be reversed for the foregoing errors, and the case remanded for a new trial, the remaining assignment of error need not be noticed.

Reversed.

CARDWELL, J., absent.

CITY OF RICHMOND *v.* MODEL STEAM LAUNDRY.

Jan. 12, 1911.

[69 S. E. 932.]

1. Constitutional Law (§ 213*)—Equal Protection—Police Regulations—Validity.—An ordinance prescribing a penalty for using a furnace for melting metals or glass, or for using a stationary steam engine, in which fuel other than anthracite coal is used, without a permit from the city council, fixing the location, height of stacks, etc., is invalid, as violating Const. U. S. Amend. 14, in that it vests

*For other cases, see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

in the city council arbitrary power and unreasonable power; no conditions upon which the permit may be granted or rules securing impartial exercise of the power being prescribed.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 213.*]

2. Constitutional Law—(§ 46*)—Determination of Question.—A municipal ordinance which permits exercise of arbitrary and unreasonable power will be held invalid, without awaiting actual exercise of such power.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 43-45; Dec. Dig. § 46.*]

Error to Hustings Court of Richmond.

The Model Steam Laundry was tried for violating an ordinance of the city of Richmond, and the city brings error from a judgment declaring the ordinance void. Affirmed.

H. R. Pollard and *Geo. Wayne Anderson,* for plaintiff in error.
R. E. Peyton, Jr., and *Sands & Swartwout,* for defendant in error.

WHITTLE, J. The defendant in error was fined by the police justice of the city of Richmond for violation of the following ordinance:

"No furnace for melting iron or other metals, or making glass, and no stationary steam engine, designed for use in any mill for planing or sawing boards, or turning wood, or for any other purpose, or in which other fuel than anthracite coal is used to create steam, shall be erected, or put up to be used in this city, unless a permit therefor shall have been first granted by the city council, prescribing the place where the building in which such steam engine or furnace is to be used, is located, or where the same shall be erected; the materials and construction thereof, with such regulations as to height of stacks or chimneys, as to prevent the use of the same from being offensive to the occupants of adjacent property; and such protection against fire as they may deem necessary for the safety of the neighborhood. Every person erecting, setting up, or using any such furnace or steam engine without the said permit, or in violation of any of the conditions, provisions, restrictions or regulations thereof, shall be deemed guilty of a misdemeanor, and upon conviction thereof before the police justice, shall be fined not less than five nor more than twenty dollars, and each day's continuance of such misdemeanor shall be a separate offense."

On appeal to the hustings court, the ordinance was held to be

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

in contravention of the fourteenth amendment of the Constitution of the United States, in that it vests in the city council arbitrary and unreasonable power.

Careful consideration of the condemned ordinance shows that it prescribes no fixed rules for the conduct of the businesses with which it undertakes to deal, applicable alike to all citizens who may bring themselves within its terms; but every person desiring to engage in such occupations must first obtain a permit from the city council, whose powers are undefined and absolute; and in default thereof shall be deemed guilty of a misdemeanor. The ordinance prescribes no conditions upon which the permit may be granted, and furnishes no rules by which an impartial exercise of the power vested in the council may be secured. The discretion of that body is in no way regulated or controlled, and is purely arbitrary.

It is no answer to these objections to say "that it is time enough to complain of the ordinance when the power of the city council shall have been arbitrarily exercised." The test of the validity of a law is not what has been done, but what may be done under its provisions. As far as our investigation of the authorities has gone, they are practically unanimous in declaring invalid ordinances of this character as obnoxious to the equality and uniformity clause of the Constitution.

The case of Yick Wo *v.* Hopkins, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220, is a controlling authority on the subject. For violation of ordinances of the city of San Francisco, in essentials similar to the ordinance under consideration, Yick Wo, a Chinese laundryman, was convicted and fined. By habeas corpus proceeding, the case was carried to the Supreme Court of the United States, where the ordinances were declared unconstitutional. Mr. Justice Matthews, in delivering the unanimous opinion of the court, on page 366, observes: "They seem to confer, and actually do confer, not a discretion to be exercised upon a consideration of the circumstances of each case, but a naked and arbitrary power to give or withhold consent, not only as to places, but as to persons. So that, if an applicant for such consent, being in every way a competent and qualified person, and having complied with every reasonable condition demanded by any public interest, should, failing to obtain the requisite consent of the supervisors to the prosecution of his business, apply for redress by the judicial process of mandamus, to require the supervisors to consider and act upon his case, it would be a sufficient answer for them to say that the law had conferred upon them authority to withhold their assent, without reason and without responsibility. The power given to them is not confined to their discretion in the legal sense of that term, but is granted to their

mere will. It is purely arbitrary, and acknowledges neither guidance nor restraint."

The binding authority of that case is not affected by the suggestion that the San Francisco ordinances were aimed at Chinese laundrymen only. That, it is true, was one of the manifestations of the pernicious character of the legislation in the particular case; but the language of the ordinance there, as in this case, is general; and the decision of the court was not rested wholly on considerations of race discrimination.

Without undertaking to review the authorities, we deem it sufficient to say that the question involved has been decided by the courts of last resort in many of the states, and the views expressed by the Supreme Court of the United States in the Yick Wo Case have been steadfastly adhered to. See 28 Cyc. 767, 768; City Council of Montgomery *v.* West, 40 South. 215,[1] 9 L. R. A. (N. S.) 654; Walsh *v.* City of Denver, 11 Colo. App. 523, 53 Pac. 458; City of Richmond *v.* Dudley, 129 Ind. 112, 28 N. E. 312, 13 L. R. A. 527, 28 Am. St. Rep. 180; State *v.* Dubarry, 44 La. Ann. 1117, 11 South. 718; Cicero Lumber Co. *v.* Town of Cicero, 176 Ill. 27, 51 N. E. 758, 42 L. R. A. 696, 68 Am. St. Rep. 155; Boyd *v.* Board of Councilmen of Frankfort, 117 Ky. 199, 77 S. W. 669, 111 Am. St. Rep. 240; Newton *v.* Belger, 143 Mass. 598, 10 N. E. 464; State *v.* Tenant, 110 N. C. 609, 14 S. E. 387, 15 L. R. A. 423, 28 Am. St. Rep. 715; Goodale *v.* Sowell, 62 S. C. 525, 40 S. E. 970; Sioux Falls *v.* Kirby, 6 S. D. 62, 60 N. W. 156, 25 L. R. A. 621; Newbern *v.* McCann, 105 Tenn. 165, 58 S. W. 114, 50 L. R. A. 476.

On the contrary, an examination of the decisions relied on by the city shows that they arose under ordinances affecting the police power of municipalities with respect to the use of parks and streets, the sale of spirituous liquors and tobacco, and the like, which are readily distinguishable from the case in judgment.

Upon the whole case, we are of opinion that the judgment of the hustings court is plainly right and must be affirmed.

Affirmed.

CARDWELL, J., absent.

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[1]Reported in full in the Southern Reporter; reported as a memorandum decision without opinion in 146 Ala. 680.